STATE OF MICHIGAN

IN THE SUPREME COURT

MILDRED L. LAWRENCE, Personal Representative of the Estate of LLOYD C. GINGER, Deceased,

Plaintiff-Appellee,

-vs-

BATTLE CREEK HEALTH SYSTEMS,

Defendant-Appellant.
_____/

Supreme Court No. 122215

Court of Appeals No. 224874

Lower Court No. 98-000973-NO

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

PROOF OF SERVICE

*** ORAL ARGUMENT REQUESTED ***

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Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN INSTRUCTING THE JURY BASED ON MCivJI 10.02?

Plaintiff-Appellee says "No".

Defendant-Appellant says "Yes".

III. DID THE CIRCUIT COURT ERR IN DENYING DEFENDANT-APPELLANT'S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT?

Plaintiff-Appellee says "No".

Defendant-Appellant says "Yes".

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL BASED EITHER ON THE CLAIM THAT THE JURY'S VERDICT WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE OR THAT THE JURY'S VERDICT WAS INCONSISTENT?

Plaintiff-Appellee says "No".

Defendant-Appellant says "Yes".

COUNTER-STATEMENT OF FACTS

As of June 26, 1997, Lloyd Ginger was eighty-six years old. Approximately seven years before, Mr. Ginger had been diagnosed with multiple myeloma (Apx. pg. 7b). Because of this disease, Mr. Ginger underwent a bone scan approximately once per year. (Apx. pg. 4b).

On June 26, 1997, Mr. Ginger went to the x-ray department of Leila Hospital for a bone scan. The x-ray technician responsible for Mr. Ginger's bone scan on that date was Stephen Lee Horton. There was a third person in the small x-ray room with Mr. Ginger and Mr. Horton, Brooke Kever. Ms. Kever was an eighteen year old student at Kellogg Community College, beginning her second year in the school's radiography program. (Apx. pg. 11b). Mr. Horton was Ms. Kever's clinical instructor at the hospital. (Apx. pg. 21b). Ms. Kever had never before assisted in a bone scan. (Apx. pg. 12b).

The procedure began with Mr. Horton taking a chest x-ray of Mr. Ginger. (Apx. pg. 5b). The bone scan continued with Mr. Ginger being placed on a table while a series of x-rays were taken. (Apx. pgs. 8b-9b). Because the level of the table was quite high, a patient could not simply sit up onto the table (Apx. pg. 13b). Thus, it was necessary for Mr. Ginger to use a stool to get onto the table. (*Id.*). The x-ray table itself was relatively narrow and was not equipped with side rails. (Apx. pgs. 14b-15b). The table could be moved through mechanical devices located next to the table. (Apx. pgs. 13b, 16b, 22b-23b). Ms. Kever estimated that the table was moved twenty to thirty times during the course of Mr. Ginger's bone scan. (Apx. pg. 19b).

After Mr. Ginger used the stool to get onto the table, Ms. Kever or Mr. Horton took the stool away from the table to get it out of the way while the bone scan was performed. (Apx. pg. 17b). During the procedure which followed, Mr. Ginger was positioned in various ways on the

narrow x-ray table, on his back, his side and his stomach. (Apx. pgs. 8b-9b, 27b).

Both Ms. Kever and Mr. Horton acknowledged that during the x-ray procedure, Mr. Ginger did not exhibit any disorientation or inability to respond to their requests. (Apx. pg. 25b-26b, 32b-33b). He was cooperative and responsive throughout. (Apx. pgs. 26b, 32b). Moreover, prior this bone scan, Dr. Horton had not been advised by Mr. Ginger's physicians that his present medical condition put him at any risk during the bone scan procedure. (Apx. pg. 29b). To the contrary, Mr. Horton acknowledged that there was no indication in either Mr. Ginger's medical condition or his behavior on June 26, 1997 that Mr. Ginger was not an appropriate patient for this procedure. (Apx. pg. 30b).

What happened at the conclusion of the bone scan, as Mr. Ginger was lying on the table on his stomach (Apx. pg. 148a), was the subject of some dispute at the trial in this case. Mr. Ginger testified that when the final x-ray was taken, Mr. Horton told him that the bone scan was completed, but that Mr. Ginger was to remain lying on the table while the x-rays were checked. (Apx. pg. 137a). Mr. Ginger was lying on the table with his eyes closed, thinking that he could nod off to sleep for a while, when he felt himself moving and he slid off the end of the table. (Apx. pgs. 140a-141a). Mr. Ginger testified that, prior to falling off the table, he had not been moving, but the next thing he knew, he was falling off the table. As he fell, the upper part of his body ended up in Ms. Kever's lap, while the lower part of his body hit the floor. (Apx. pgs. 140a-141a; Apx. pgs. 6b, 10b).

Ms. Kever, on the other hand, testified that the final x-ray in the bone scan had been taken and she told Mr. Ginger that the procedure was completed and that he could leave. (Apx. pg. 18b; Apx. pg. 148a). According to Ms. Kever, Mr. Ginger started to roll over from his position

on the table. As Mr. Ginger began rolling, Ms. Kever did not move to help him. (Apx. pg. 148a). As Ms. Kever later explained it, Mr. Ginger surprised her with the quickness of his movements as he shifted his hips and started to move backward toward the side of the table that she was on. (Apx. pgs. 148a-151a). Mr. Ginger fell off the narrow table and landed on Ms. Kever. (App. pg. 148a). She was knocked to the ground, cradling Mr. Ginger's head and shoulders. (Apx. pg. 148a; Apx. pg. 19b). Ms. Kever stated that Mr. Ginger fell because of the quick shift which he had made after she told him that he could leave and her inability to keep him on the table as he shifted. (Apx. pg. 20b).

Ms. Kever was also to testify that at the time of Mr. Ginger's fall, she had not had any training with respect to the handling of patients on an x-ray table. (Apx. 149a). Indeed, Ms. Kever indicated at trial that such specialized training was unnecessary; according to her, what was important was using "common sense" in dealing with patients on an x-ray table. (Apx. pg. 149a).

The third person in the x-ray room, Mr. Horton, also testified at the trial of this case. Mr. Horton did not see how Mr. Ginger fell from the table. (Apx. pg. 28b). Mr. Horton testified that, as Ms. Kever's clinical instructor, he acted as her assistant in conducting the June 26, 1997 bone scan of Mr. Ginger. (Apx. pgs. 34b-36b).

As result of his fall from the x-ray table, Mr. Ginger suffered a fractured hip.

Mr. Ginger filed a Complaint in the Calhoun County Circuit Court on March 6, 1998. (Apx. pgs. 26a-28a). The sole defendant named in that Complaint was Battle Creek Health Systems. In his Complaint Mr. Ginger alleged that Battle Creek Health Systems was vicariously liable for the negligence of Mr. Horton and Mr. Kever committed during the June 26, 1997 bone

scan. Mr. Ginger also alleged that both Mr. Horton and Mr. Kever were employees of Battle Creek Health Systems. (Complaint, ¶5, Apx. pg. 27a). In the Answer which it filed in response to Mr. Ginger's Complaint, Battle Creek Heath Systems acknowledged that Mr. Horton and Ms. Kever were its employees (Answer, ¶5; Apx. pg. 1b), but it denied that they had been responsible for any negligence that caused Mr. Ginger's injuries. (Apx. pg. 2b).

Mr. Ginger's cause of action was ultimately tried to a jury in July 1999. Before, during and after trial, Battle Creek Health Systems raised the claim that Mr. Ginger's cause of action was premised on medical malpractice, not ordinary negligence. Thus, before, during and after trial, the defendant argued that Mr. Ginger's case should be dismissed because he had failed to comply with the procedural prerequisites for a medical malpractice action. Each time that the defendant made the argument that this was a medical malpractice action, the circuit court rejected defendant's position.

At the conclusion of the proofs, the jury was presented with a form on which to record its verdict. (Apx. pgs. 62b-64b). This jury verdict form asked the jury to decide whether the defendant was negligent and whether that negligence was a proximate cause of Mr. Ginger's injury. (Apx. pgs. 62b-63b). The verdict form also asked the jury to consider whether Mr. Ginger was himself negligent and whether that negligence represented a proximate cause of his injury. (Apx. pg. 63b). The jury was also asked to assess the extent of the damages which Mr. Ginger suffered. (Apx. pg. 64b).

In preparing the jury verdict form, counsel for Battle Creek Health Systems indicated that if the jury decided to award damages against his client, he might later pursue a claim against Kellogg Community College, the college which Ms. Kever was attending at the time of Mr.

Ginger's fall. (Apx. pg. 37b). For this reason, counsel for the defendant insisted that the verdict form include a question pertaining to the relative fault of Mr. Horton and Ms. Kever in contributing to Mr. Ginger's injuries. (Apx. pgs. 37b-38b). Counsel for plaintiff objected to the inclusion of this question on the verdict form, arguing that an allocation of fault between Mr. Horton and Ms. Kever was completely irrelevant to the outcome of this case. (Apx. 38b-39b; 42b-44b). The trial court overruled plaintiff's objection and he required the jury to make a determination of the relative fault of Mr. Horton and Ms. Kever. (Apx. pgs. 63-64b).

The jury returned its verdict on July 30, 1999. (Apx. pgs. 69b-72b). The jury concluded that the defendant was negligent and that its negligence caused Mr. Ginger's injury. (Apx. pgs. 69-70b). The jury further found that Mr. Ginger was himself negligent and that his negligence contributed to the injuries which he sustained. (Apx. pg. 70b). The jury assessed Mr. Ginger's comparative negligence at 20%. (*Id*). With respect to the question which the defendant asked the jury to answer regarding the relative percentage of Mr. Horton's and Ms. Kever's contribution to Mr. Ginger's injury, the jury foreman indicated that "we put 100% on . . . Steven Horton." (Apx. pgs. 70-71b).

Following the entry of a judgment and denial of its post-trial motions, Battle Creek Health Systems appealed to the Michigan Court of Appeals.

The Court of Appeals in an unpublished decision dated June 4, 2002 affirmed the circuit court's judgment in its entirety. (Apx. pgs. 248a-251a). On the central issue raised by the defendant on appeal - whether this case is properly categorized as one for medical malpractice or ordinary negligence, the Court of Appeals relied on this Court's decision in *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26; 594 NW2d 455 (1999), in concluding that plaintiff's claim

was for ordinary negligence. (Apx. pg. 249a).

Battle Creek Health Systems applied for leave to appeal in this Court and on July 3, 2003, this Court issued an order granting that application for leave to appeal. *Lawrence v Battle Creek Health Systems*, 468 Mich 941; 664 NW2d 222 (2003).

SUMMARY OF THE ARGUMENT

The question of whether this cause of action is for ordinary negligence or medical malpractice is controlled by this Court's 1999 decision in *Dorris v Detroit Osteopathic Hospital Corporation*, 460 Mich 26; 594 NW2d 455 (1999). Under that decision, there are two essential components of a medical malpractice claim. The claim must arise out of the existence of a professional relationship. In addition, in distinguishing between professional and ordinary negligence, the critical question is whether the facts raise issues of negligence which are within the common knowledge and experience of the trier of fact or, alternatively, whether the issues raise questions involving medical judgment. In this case, the agents of the defendant responsible for Mr. Ginger's injuries did not engage in any medical judgments relative to his fall. Instead, they failed to take reasonable precautions to insure that Mr. Ginger would not fall as he began the process of getting off the table. What a reasonable person would do to prevent Mr. Ginger from falling represents a theory of negligence which is within the common knowledge and experience of the jury. Under *Dorris*, this was a claim for ordinary negligence.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DETERMINED THAT PLAINTIFF'S CAUSE OF ACTION WAS A CLAIM FOR ORDINARY NEGLIGENCE, NOT A CLAIM BASED ON MEDICAL MALPRACTICE.

A. *Dorris* And Prior Michigan Cases Arising Out Of A Patient's Fall.

Battle Creek Health Systems has argued throughout this litigation that this case should have been dismissed because of plaintiff's failure to file a presuit notification under MCL 600.2912b, and because of plaintiff's failure to submit an affidavit of merit with his Complaint as

provided in MCL 600.2912d. By their express language, these two statutes apply only to "an action alleging medical malpractice." MCL 600.2912b(1); MCL 600.2912d(1). Thus, the essential question presented in this case is whether plaintiff's negligence claim based on Mr. Ginger's fall from an x-ray table constitutes a cause of action for medical malpractice, thereby triggering the operation of MCL 600.2912b and MCL 600.2912d.

While MCL 600.2912b and MCL 600.2912d extend only to "actions alleging medical malpractice", the term "medical malpractice" is not defined in either of these two statutes. Moreover, as this Court has observed on a number of occasions, the term "medical malpractice" is not defined in any section of the Revised Judicature Act. *Kambas v St. Joseph Mercy Hospital of Detroit*, 389 Mich 249, 253-254; 205 NW2d 431 (1973); *Sam v Balardo*, 411 Mich 405, 419-424; 308 NW2d 142 (1981); *Adkins v Annapolis Hospital*, 420 Mich 87, 92; 360 NW2d 150 (1984); *Dennis v Robbins Funeral Home*, 428 Mich 698, 702; 411 NW2d 156 (1987); *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 329; 535 NW2d 187 (1995). It is, therefore, the common law which supplies the definition of the term "medical malpractice".

The common law standard was recently addressed by this Court in *Dorris v Detroit Osteopathic Hospital Corporation*, 460 Mich 26; 594 NW2d 455 (1999). In *Dorris*, this Court emphasized that a central component of a medical malpractice claim, "is whether it is alleged that the negligence occurred within the course of a professional relationship." 460 Mich at 45, *citing Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647; 438 NW2d 276 (1989). The Court in *Dorris* then provided the following distinction between a claim for medical malpractice and a cause of action based on ordinary negligence:

> The determination whether a claim will be held to the standards of

> proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment.
>
> 460 Mich at 46.

As in *Dorris*, this Court is once again called upon to decide whether a particular cause of action is based on ordinary negligence or medical malpractice. It is, therefore, the test articulated by the Court in *Dorris* which must control here. *Cf Wesley v Gehrke*, 461 Mich 894; 601 NW2d 695 (1999) (affirming the test set out in *Dorris*, J. Corrigan dissenting). Under the *Dorris* test, this Court should conclude that the Court of Appeals was correct in holding that plaintiff's case was premised on ordinary negligence, not medical malpractice.

The courts of this state have on several prior occasions had to determine whether a medical patient who was injured in a fall possesses a claim for ordinary negligence or for medical malpractice. The earliest of these cases was *Paulen v Shimick*, 291 Mich 288; 289 NW 162 (1939). In *Paulen* the plaintiff, who had prior suicidal tendencies, was a patient in a private sanitarium. The plaintiff was assigned to the third floor of that institution. The windows on the third floor had screens which were equipped with locks. The nurse who had been assigned responsibility for the plaintiff opened the window at the plaintiff's request, but failed to lock the screen on that window. While the nurse's attention was otherwise occupied, the plaintiff jumped through the unlocked screen and fell three floors.

Among the issues presented to this Court in *Paulen* was whether the plaintiff's claim based on the nurse's negligence had to be supported by expert witnesses. This Court held in *Paulen* that the determination of whether the nurse "should have locked the screen . . . or to have

taken some other precaution to prevent plaintiff's escape, is not a question on which a jury requires the advice of trained psychiatrists." 291 Mich at 292.

In the span of one year the Michigan Court of Appeals considered two cases in which hospital patients sustained injuries when they fell, *Fogel v Sinai Hospital Detroit*, 2 Mich App 99; 138 NW2d 503 (1965) and *Gold v Sinai Hospital of Detroit, Inc.*, 5 Mich App 368; 146 NW2d 723 (1966). The plaintiff in *Fogel* was a patient in a hospital who requested assistance to go to the bathroom. A nurse's aide responded to the plaintiff's request and, while the aide was attempting to assist the plaintiff, the plaintiff slipped and fell. Following a verdict in favor of the plaintiff, the defendant hospital appealed, claiming, *inter alia*, that the cause of action was a malpractice claim which had to be supported by expert testimony. The Court of Appeals rejected this contention and concluded that expert testimony is only a requirement in a medical malpractice case. 2 Mich App at 102.

In *Gold*, the plaintiff fell and was injured while being assisted by a nurse onto an examination table. The trial court in *Gold* granted a directed verdict in favor of the defendant hospital on the ground that plaintiff did not present expert testimony to support her claim. The Court of Appeals reversed, after finding that the plaintiff's case was controlled by *Fogel*: "neither *Fogel* nor the instant case present a malpractice question but rather a question of ordinary negligence." 5 Mich App at 370.[1]

The distinction between medical malpractice and ordinary negligence drawn by the Court

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[1]Another Court of Appeals' decision which confirmed that a patient's fall in a hospital would support a claim for ordinary negligence is *Bishop v St. John Hospital*, 140 Mich App 720; 364 NW2d 290 (1984). In *Bishop*, the plaintiff, a post-surgery hospital patient, fell while walking to the bathroom. The Court of Appeals held therein that, had plaintiff chosen to proceed on a claim of ordinary negligence, that theory would have been available to her.

of Appeals in *Fogel* and *Gold* took on greater significance because of two subsequent decisions of this Court. The first of these cases was *Wilson v Stilwill*, 411 Mich 587; 309 NW2d 898 (1981). In *Wilson*, the plaintiff had surgery on his arm. Following that surgery an infection developed which ultimately led to paralysis in the plaintiff's arm. The plaintiff sued the surgeon who operated on him and the hospital where the surgery was performed. One of the plaintiff's theories against the hospital was that a doctor or some other qualified person should have been present with the plaintiff following surgery to ascertain whether an infection was developing. Plaintiff further argued, based primarily on *Fogel* and *Gold*, that this theory of hospital liability was a claim for ordinary negligence, not medical malpractice.

This Court in *Wilson* rejected the plaintiff's argument that this theory of liability against the defendant hospital represented an action based on ordinary negligence. In doing so, however, the *Wilson* Court recognized that, "whether a hospital's negligence must be shown by expert testimony depends on the circumstances of the particular case." 411 Mich at 611. The Court in *Wilson* went on to reject the plaintiff's attempt to bring his theory of recovery within the ambit of the Court of Appeals' rulings in *Fogel* and *Gold*:

> The plaintiffs rely on two cases in support of their theory. *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965), *clearly involved a case of ordinary negligence.* Fogel had warned a nurse's aide that one aide was not capable alone of helping her get to the bathroom. The aide could not hold her and she fell and fractured her hip. *Gold v Sinai Hospital of Detroit, Inc.*, 5 Mich App 368; 147 NW2d 723 (1966), also held that a patient's fall in a hospital was a matter of ordinary negligence. However, *These cases presented issues which are within the common knowledge and experience of a jury.*
>
> In contrast to *Fogel* and *Gold*, the instant case presents a standard of conduct issue which cannot be determined by common

> knowledge and experience, but rather raises a question of medical judgment.
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> 411 Mich at 611 (emphasis added).

This Court's decision in *Wilson* is significant herein for at least two reasons. First, the analysis employed in *Wilson* makes it clear that not every act of negligent conduct on the part of a hospital's agent occurring within the hospital setting will give rise to a cause of action for medical malpractice. Rather, the question of whether a hospital's negligence constitutes medical malpractice "depends on the circumstances of the particular case." 411 Mich at 611.

The decision in *Wilson* is also of significance here because the Court expressly approved the conclusions reached by the Court of Appeals in *Fogel* and *Gold*. This Court in *Wilson* explicitly affirmed the fact that the negligence which occurred in the *Fogel* and *Gold* cases constituted ordinary negligence, not medical malpractice. 411 Mich at 611.

A second decision from this Court which is of considerable significance here is *Adkins v Annapolis Hospital*, 420 Mich 87; 360 NW2d 150 (1984). In *Adkins*, the plaintiff injured his foot. That injury was improperly diagnosed by doctors at the emergency department of the defendant hospital. Plaintiff later sued the hospital, originally asserting that portions of his claim were based on ordinary negligence.

By the time the *Adkins* case reached this Court, the legal issue involved concerned the question of whether the two year limitations period applicable to a malpractice claim applied to the plaintiff's case or whether the case was to be governed by the three year limitations period applicable to negligence actions. In the Supreme Court, the plaintiff abandoned any claim that the defendant hospital was being sued for ordinary negligence. This Court held in *Adkins* that the

allegations contained in the plaintiff's Complaint were governed by the malpractice limitations period. In arriving at this conclusion, the *Adkins* Court emphasized that the result would be different if plaintiff's claim had been based on ordinary negligence, as opposed to malpractice:

> The plaintiff has not pursued in this Court his claim that his complaint alleged ordinary negligence, rather than medical malpractice. *Some hospital errors in patient treatment may, of course, be ordinary negligence rather than malpractice.* Illustrating this point, the Court of Appeals below wrote, "[w]e observe that the facts pleaded in this case are distinguishable from those in *Fogel v Sinai Hospital of Detroit*, 2 Mich App 99; 138 NW2d 503 (1965), and *Gold v Sinai Hospital of Detroit, Inc.*, 5 Mich App 368; 146 NW2d 723 (1966), in which patients' suits against hospitals for falls were held to sound in ordinary negligence and not malpractice." 116 Mich App 564.
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> 420 Mich at 95, n. 10 (emphasis added).

Adkins reaffirmed the Court's conclusion in *Wilson* that not every act of negligence occurring in a hospital setting gives rise to a claim for medical malpractice: "some hospital errors in patient treatment may, of course, be ordinary negligence rather than malpractice." 420 Mich at 95, n. 10. *Adkins* also represented the second decision of this Court approving the results reached by the Court of Appeals in *Fogel* and *Gold*.

One other case involving a patient suffering injuries in a fall deserves mention here. As noted previously, the Court's definitive decision on the distinction between medical malpractice and ordinary negligence is *Dorris*. In *Dorris*, this Court twice cited with favor a federal district court decision which also addressed that distinction, *McLeod v Plymouth Court Nursing Home*, 953 F Supp 113 (ED Mich 1997). 460 Mich at 43, 46. In *McLeod*, the plaintiff was a resident in a nursing home who fell and was injured while trying to get into a wheelchair. In the federal diversity action which followed, the defendant argued that the case had to be dismissed because

plaintiff did not comply with the notice of intent statute, MCL 600.2912b. On the basis of *Wilson, Adkins, Fogel* and *Gold*, the federal court in *McLeod* ruled that plaintiff was not compelled to comply with MCL 600.2912b because the cause of action arising out of her fall was premised on ordinary negligence, not malpractice:

> Where the parties dispute whether plaintiff has alleged malpractice or ordinary negligence, courts have attempted to ascertain whether the facts alleged present issues which are within the common knowledge and experience of the jury or, in the alternative, raise a question of medical judgment. *See Wilson v Stilwill, Adkins, supra* at 89. The cases presenting a question of medical judgment have all been distinguished from *Fogel, supra* and *Gold, supra*, in which patients' suits for falls were held to sound in ordinary negligence.
>
> This Court is satisfied that plaintiff's complaint alleges a theory of ordinary negligence as the basis for recovery. Further, to the extent that the theory of recovery as presented in plaintiff's complaint is ambiguous, the Court finds that the facts alleged present issues within the common knowledge and experience of the jury rather than those of medical judgment.
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> 957 F Supp at 115 (citations omitted).

Thus, *Dorris* not only supplied the legal standard on which medical malpractice claims are to be distinguished from claims for ordinary negligence, *Dorris* also embraced a federal court decision which found that a patient who claimed negligence associated with a fall that occurred in a health care facility stated a claim for ordinary negligence.

B. Application Of The *Dorris* Test To This Case.

Based on this Court's decision in *Dorris*, the Court of Appeals' decision in this case should be affirmed. *Dorris* first indicated that one of the central requirements of an action based on medical malpractice is whether "the negligence occurred within the course of a professional relationship." 460 Mich at 45; *see also Cox v Board of Hospital Managers for the City of Flint*,

467 Mich 1, 10-11; 651 NW2d 356 (2002). This Court has never definitively addressed the scope of a "professional relationship" for purposes of determining the existence of a medical malpractice case. Obviously, such a "professional relationship" would arise out of the doctor-patient relationship. It would also appear to be true from the analysis employed by this Court in *Cox, supra*, that the term "professional relationship" would extend to any health care professional who is licensed under Michigan law. *Cox*, 467 Mich at 19. Such professional licensing is provided in Article 15 of the Public Health Code, MCL 333.16101, *et seq*. Article 15 of the Public Health Code also includes a definition of the term "health profession": "a vocation, calling, occupation or employment performed by individuals acting pursuant to a license or registration issued under this article." MCL 333.16105(2).

It is clear that Ms. Kever, as a student trainee, could not be classified as a member of a health profession under the definition provided in MCL 333.16105(2). Based on this statutory definition and the nature of Ms. Kever's role in conjunction with the bone scan conducted on Mr. Ginger on June 26, 1997, the Court should conclude that any negligence on the part of Ms. Kever could not arise out of the existence of a professional relationship.

Moreover, it does not appear that Mr. Horton falls within the definition of "health professional" provided in MCL 333.16105. Mr. Horton is not engaged in any of the fields to which the licensing or registration provisions of Article 15 of the Public Health Code apply. There is, therefore, a serious question of whether Ms. Kever or Mr. Horton could establish the fundamental prerequisite for a medical malpractice claim - whether the negligence alleged herein

occurred within the course of a professional relationship.[2]

However, even if the Court concluded that the negligence which took place herein occurred within the course of a professional relationship, the fact remains that the defendant still cannot satisfy the test set out by this Court in *Dorris*. *Dorris* continued a long line of Michigan cases in recognizing that the distinction to be drawn between ordinary negligence and medical malpractice is dependent on whether the facts raise issues "in the common knowledge and experience of the jury" or, alternatively, whether they raise questions involving medical judgment. 460 Mich at 45-46.

One of the truly striking aspects of this case concerns the nature of the defendant's repeated assertion that this is a medical malpractice claim because it implicates a "medical judgment." At every phase of this case, Battle Creek Health Systems has insisted that this is a medical malpractice case. At every phase of this case, Battle Creek Health Systems has maintained that this is a medical malpractice action because the negligence alleged herein touches on "medical judgment." Yet, at every single phase of this case the defendant has studiously failed to provide *any* factual support for this assertion.

Prior to trial, the defendant filed two motions for summary disposition (Motion, Apx. pgs.

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[2]Nor can the defendant contend that the "professional relationship" requirement is met because the defendant hospital itself possessed a "professional relationship" with Mr. Ginger. Such an argument would be directly at odds with the analysis employed by this Court in its recent decision in *Cox, supra*, which held that a hospital's liability must be premised on the conduct of its agents. 467 Mich at 11-12. Moreover, as this Court has held in *Kambas, supra*, and *Adkins, supra*, a hospital, "whose liability was predicated on a theory of *respondeat superior* could be in no better position that the employees through whom liability was traced." *Adkins*, 420 Mich at 90. Thus, Battle Creek Health Systems' liability is dependent on the liability of its agents and if these agents were responsible for ordinary negligence, not medical malpractice, the same would be true with respect to the liability of Battle Creek Health Systems.

30a-43a; Renewed Motion, Apx. pgs. 63a-76a). In its original motion, the defendant proceeded on the erroneous assumption that, because Mr. Ginger's injuries occurred during the course of a medical procedure, his claim was, of necessity, one for medical malpractice. (Apx. pg. 37a). In the brief filed in support of that motion, the defendant also made reference to the legal standard to be applied in deciding whether this was an ordinary negligence claim or one premised on medical malpractice - whether plaintiff's claims represent "issues involving professional judgment beyond the common knowledge and experience of laymen." (Apx. pg. 40a). Yet, after posing this test, the defendant simply *announced*, in completely conclusory fashion, that plaintiff's negligence claim had to be one for medical malpractice because it involved "professional training, skill and judgment." (Apx. pg. 40a).

What was completely lacking from the defendant's original motion for summary judgment were facts necessary to support the unadorned assertion that plaintiff's negligence claim involved "professional training, skill and judgment." Notably, there was no affidavit submitted with this motion signed by Mr. Horton or some other qualified person identifying precisely what "medical judgment" was involved with Mr. Ginger's unfortunate fall from an x-ray table. Instead, what the defendant did in its original motion for summary disposition was to *declare* that the negligence involved herein implicated medical judgment. In proceeding in this fashion the defendant did not even attempt to describe precisely what medical judgments might have been involved. More importantly for purposes of a summary disposition motion, the defendant did not provide any *facts* to support its mere declaration that this case involved "medical judgment."

In *Quinto v Cross & Peters Company*, 451 Mich 358; 547 NW2d 314 (1996), this Court

recognized that in a motion filed under MCR 2.116(C)(10), "the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." 451 Mich at 358. As *Quinto* demonstrates, a party moving for summary disposition under MCR 2.116(C)(10) does not comply with its initial burden by merely *announcing* that certain facts exist. That party must, instead, submit *facts* to supporting its position. The defendant herein completely failed to comply with *Quinto* in its initial motion. The defendant maintained that it was entitled to summary disposition based on its *assertion* that medical judgment was somehow implicated in this case. However, as *Quinto* makes clear, the defendant was not entitled to a determination as a matter of law that medical judgment was involved in this case simply because the defendant *said* that medical judgment was involved.

Following the denial without prejudice of its original motion for summary disposition, Battle Creek Health Systems took some amount of discovery and proceeded to file a renewed motion for summary disposition (Apx. pgs. 63a-76a). That renewed motion and brief in support were strikingly similar to the defendant's original motion. While the defendant's renewed motion papers contained some limited citation to the discovery conducted in the case, on the critical question presented in this case under *Dorris*, the defendant again simply *announced* in its remewed motion and brief that Mr. Ginger's claim was one for medical malpractice because the negligence asserted therein involved "professional training, skill and judgment." (Apx. pg. 75a). Yet, in *announcing* that professional training, skill and judgment were somehow involved in this case, the defendant mysteriously left the circuit court to determine on its own precisely what "training, skill and judgment" was involved in Mr. Ginger's negligence claim. Again, there was no affidavit signed by Mr. Horton or a qualified person filed with the defendant's renewed

motion indicating precisely what "professional training, skill and judgment" came into play in this case.

When the defendant's renewed motion for summary disposition was also denied, the case proceeded to trial. At that trial, the defendant made no effort to provide factual support for its announced position that the negligence alleged in this case involved medical judgment. Indeed, remarkably, the trial court record completely refuted the conclusory suggestion in defendant's summary disposition motions that medical judgment was involved in the negligence that led to Mr. Ginger's injuries. During the trial testimony of Ms. Kever, she was asked several questions regarding her training with respect to patients being positioned on an x-ray table. Ms. Kever responded to these questions by acknowledging that she had no specialized training on this subject and, instead, relied on "common sense":

> Q. Now have you had patients on the table before?
>
> A. Yes.
>
> Q. Okay. And as I recall, *you don't have any specific training with regard to handling of patients on the table, do you?*
>
> A. *No.*
>
> Q. And as I think you said, *you use your common sense, is that right?*
>
> A. *Correct.*
>
> Q. And there's no - nothing special taught to you at school about manipulating physically patients on the table either, is there?
>
> A. No.
>
> (Apx. pg. 149a) (emphasis added).

Ms. Kever's testimony, therefore, completely supported the view that the jury could decide the issue of negligence on the basis of their own knowledge and experience, using their own common sense.

Furthermore, in his trial testimony, Mr. Horton never suggested that Mr. Ginger's fall from the table somehow implicated his own medical skill or judgment. Indeed, Mr. Horton testified at trial that the procedure that Mr. Ginger was undergoing was so routine that Mr. Horton was serving as the assistant to Ms. Kever, a second year student who had never before taken part in a bone scan. (Apx. pgs. 34b-36b).

It is also extremely important in this context to note that Mr. Horton acknowledged at trial that there was nothing in Mr. Ginger's medical condition or his behavior prior to his fall that suggested that he was at risk for such a fall. Mr. Horton testified that Mr. Ginger's doctors did not notify him in advance that Mr. Ginger's medical condition put him at risk during the bone scan. (Apx. pg. 29b). Mr. Horton was also specifically asked if Mr. Ginger had any physical difficulty during the chest x-rays which were competed before he was placed on the table. Mr. Horton testified that Mr. Ginger was physically capable of the movements necessary and that the chest x-rays were completed without problem. (Apx. pgs. 31b-32b). Mr. Horton further recounted that Mr. Ginger had no physical difficulty getting onto the table for the bone scan. (Apx. pg. 33b). Mr. Horton testified that when the bone scan began, he had no "concern at that point that Mr. [Ginger] couldn't complete the bone survey." (*Id.*). Thus, Mr. Horton's trial testimony supplied absolutely no support for any claim that medical judgment was somehow a part of the negligence involved in this case.

Following the jury's verdict in favor of the plaintiff, Battle Creek Health Systems filed

several post judgment motions, including a motion for new trial. In that motion, the defendant again raised the question of whether this case should have proceeded as a medical malpractice claim or as one for ordinary negligence. (Apx. pgs. 196a-214a). In that motion, the defendant cited this Court's decision in *Dorris* and attempted to bring this case within the test for a medical malpractice action set out in *Dorris* by *arguing* the following:

> In this case, it is clear that the professional duties and responsibilities of the radiology clinical instructor and the radiology technology student in the performance of a bone scan are *well beyond the knowledge of the lay jury* and require expert testimony. The disputed actions required assessment of the patient's medical condition and ability to tolerate the procedure and sit up unassisted afterwards. This required the radiology technician to know, among other things, whether or not the patient had received any sedatives or injections during the procedure that could affect their ability to sit up unassisted; clearly a professional judgment.
>
> (Apx. pg. 209a) (emphasis in original).

The defendant's post-trial argument on this subject is remarkably similar to its pretrial arguments in one important respect. In its post-trial motion, the defendant again simply *asserted* that this was a medical malpractice action, it did not supply the facts necessary to make this case one for medical malpractice. What is also notable about the defendant's post-trial argument is that none of the "facts" presented in that argument are to be found in the circuit court record. Defendant asserted after trial that this was a medical malpractice action because Ms. Kever and Mr. Horton were somehow required to assess Mr. Ginger's medical condition and his ability to tolerate the procedure and his ability to sit up after the procedure was completed. Yet, the defendant never presented evidence either before trial, during trial or after trial to support this assertion. Indeed, the uncontradicted trial court record established that Mr. Ginger's fall from the

x-ray table was absolutely unconnected to the underlying medical condition which required the bone scan to be performed. The defendant further suggested in its post-trial motion that medical judgment was somehow involved in this case because Mr. Horton had to know whether or not Mr. Ginger had received medication during the procedure itself which could affect his ability to sit up. Again, the defendant never attempted to establish an appropriate factual record supporting this statement.

It is no coincidence that the recitation in the defendant's new trial motion regarding the skill and judgment supposedly required of the defendant's agents came without any citation to the trial (or the pre-trial) record. The simple fact is that there was absolutely no admissible evidence in the entire circuit court record indicating that the negligence involved herein required professional assessment of Mr. Ginger's condition or a professional assessment of the drugs which had been administered to him.

This case has now made its way to this state's highest court. The defendant has continued to argue that the negligence involved in this case somehow touches on medical skill and/or medical judgment. These arguments are, however, precisely that - *arguments*. These arguments are not supported by any evidence in the record. There is quite simply no admissible evidence in this record to support the defendant's contention that medical skill or medical judgment is involved in the negligence claim being asserted against the defendant here. There is, instead, only the defendant's unsupported *declaration* that medical skill and judgment is involved herein.

Plaintiff alleged a claim against the defendant based on ordinary negligence. If the defendant considered this allegation of ordinary negligence to be unsupportable, it was incumbent on the defendant to present the circuit court with facts documenting why this cause of

action could not be based on ordinary negligence. *Quinto, supra.* Under the test set out in *Dorris* and numerous other cases, the defendant had to come forward with ***facts***, not merely assertions, as to how medical skill or medical judgment was involved in this case. The defendant presented no such facts. As such, there is no factual support in the record for the contention that the negligence involved in this case concerned the exercise of medical skill or medical judgment.

There is, in plaintiff's view, a very important reason why the defendant has resorted to merely *declaring* the existence of medical skill or medical judgment, as opposed to supplying *facts* supporting that assertion. The reason for this is that this case never touched upon the medical skill or medical judgment to be exercised by either Ms. Kever or Mr. Horton. The negligence in this case arises from the fact that Mr. Ginger fell from what the defendant acknowledges in its brief was a "tall, thin examination table." Defendant's Brief, p. 31. The series of x-rays done on Mr. Ginger had been completed and Mr. Ginger was told by Ms. Kever that he could get up. (Apx. pg. 18b). At this point, either the table on which Mr. Ginger was laying moved or Mr. Ginger moved on this tall, narrow table and he fell, fracturing his hip.

The jury found that Battle Creek Health Systems was negligent based on the acts or omissions of its agents. Obviously, the jury found that the defendant's agents should have done something to prevent Mr. Ginger from falling from the table. Whether the defendant's agents should have taken some additional precautions to insure that Mr. Ginger would not fall from the tall, narrow table where he had been lying is a question which requires neither medical expertise nor medical insight. Indeed, one of the unique aspects of this case is that Ms. Kever, one of the defendant's agents whose negligence is involved in this case, confirmed at trial that preventing Mr. Ginger from falling did not implicate medical decision making. Ms. Kever testified that it

was "common sense," not medical judgment, which dictated her behavior while Mr. Ginger was on the x-ray table. (Apx. pg. 149a). Under the distinction drawn between ordinary negligence and medical malpractice in *Dorris*, Ms. Kever's acknowledgment that it was "common sense" which provided her direction, should be dispositive on this issue. Ms. Kever's acknowledgment is particularly important here because, as noted previously, there was no contrary evidence presented by defendant establishing that medical judgment was somehow involved in this accident.

The negligence involved in this case did not flow from medical judgments made by the defendant's agents. This would be a considerably different case if, for example, Mr. Ginger had suffered burns because of the manner in which Mr. Horton operated the x-ray equipment. *cf. Barnes v Mitchell*, 341 Mich 7; 67 NW2d 208 (1954). In that context, the nature of his negligence might be beyond the scope of the common knowledge and experience of a jury. Such a claim might touch upon medical judgment and, under *Dorris*, could be classified as a medical malpractice claim.

This might also be a different case if Mr. Ginger's preexisting medical condition had somehow contributed to his fall. If Mr. Ginger possessed a medical condition which made him susceptible to falling and that condition were known to the defendant's agents, the level of care to be exercised by the defendant's agents might be more in the realm of medical judgment. *cf Reardon v Presbyterian Hospital in the City of New York*, 292 A2d 235, 237; 739 NYS2d 65, 66 (2002) (holding that a hospital patient's fall gives rise to a claim for ordinary negligence, noting that "plaintiff's claim is not based upon an assertion that an improper assessment of her medical condition played any role in determining how to help her off the table.") But, as noted

previously, the defendant's agents explicitly testified at trial that there was nothing in Mr. Ginger's existing condition or in his behavior on the date of the bone scan that suggested that he was at risk for falling.

This case involves an eighty-six year old man required to lay in various positions on a tall, narrow table, who was told that he could get up. It requires no particular scientific knowledge other than the most rudimentary understanding of gravity to understand that these circumstances may require that some reasonable precaution be taken to insure that a person in the position of Mr. Ginger does not fall. Based on *Dorris*, the Court of Appeals' determination that this is an ordinary negligence case should not be disturbed.[3]

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[3]Battle Creek Health Systems has attempted to bolster its position that this is a medical malpractice action with references to a number of decisions from courts outside the State of Michigan. Defendant's Brief, pp. 24-26. The weight to be given these decisions is, at best, minimal since the results in these cases are frequently driven by definitions of medical malpractice, often statutory, which differ substantially from this Court's formulation in *Dorris*. Thus, review of the cases around the country demonstrates that the defendant is wildly off the mark in suggesting that the distinction between medical malpractice and ordinary negligence is "fairly universal" around the country. Defendant's Brief, p. 23. While acknowledging the limited weight to be accorded out-of-state cases, plaintiff would note that there is a considerable body of law from other states completely consistent with such decisions as *Fogel* and *Gold*, recognizing that hospital patients injured in falls have a claim for ordinary negligence, not medical malpractice. *See e.g. Reardon v Presbyterian Hospital in the City of New York, supra*; *McGraw v St. Joseph's Hospital*, 200 W Va 114; 488 SE2d 389 (1997); *Morrison v St. Luke's Health Corp*, 929 SW2d 898 (Mo App 1996); *Cockerton v Mercy Hospital Medical Center*, 490 NW2d 856 (Iowa App 1992); *Smith v North Fulton Medical Center*, 200 Ga App 464; 408 SE2d 468 (1991); *Halas v Parkway Hospital, Inc.*, 158 AD2d 516; 551 NYS2d 279 (1990); *Harts v Caylor-Nickel Hospital, Inc.*, 553 NE2d 874 (Ind App 1990); *Owens v Manor Health Care Corp*, 159 Ill App3d 684; 512 NE2d 820 (1987); *Bennett v Winthrop Community Hospital*, 21 Mass App Ct 979; 489 NE2d 1032 (1986); *Rewis v Grand Strand General Hospital*, 290 SC 40; 348 SE2d 173 (1986); *Rice v Sebasticook Valley Hospital*, 487 NE2d 638 (Me 1985); *Norris v Rowan Memorial Hospital*, 21 NC App 623; 205 SE2d 345 (1974); *Cramer v Theda Clark Memorial Hospital*, 45 Wis2d 147; 172 NW2d 427 (1969); *Washington Hospital Center v Butler*, 384 F2d 331 (DC Cir 1967).

C. The *Regalski* Decision.

In arguing that Mr. Ginger's fall from an x-ray table constitutes a medical malpractice claim, the defendant places enormous emphasis on this Court's summary order in *Regalski v Cardiology Associates, P.C.*, 459 Mich 891; 587 NW2d 502 (1998). *Regalski* involved a plaintiff who received a cut on her leg while being moved by members of the defendant's staff from her wheelchair to an examination table. Plaintiff filed suit for these injuries approximately thirty-five months after the incident. The question presented in *Regalski* was whether the two year period of limitations applicable to medical malpractice claims or the general three year limitations period for negligence actions applied to plaintiff's claim.

The circuit court granted summary disposition to the defendant based on the statute of limitations. The Court of Appeals, however, reversed in an unpublished decision. *Regalski v Cardiology Associates, P.C.*, 1997 WL 33343819 (1997). The defendant applied for leave to appeal in this Court. This Court, in lieu of granting leave to appeal, issued a summary order dated October 27, 1998, reversing the Court of Appeals' ruling.

Citing a 1975 amendment to MCL 600.5838, which is now codified in MCL 600.5838a(1), this Court ruled in *Regalski* that the Legislature had expanded the class of cases to which the two year limitations period applies:

> Since the passage of 1975 PA 142, the Legislature has extended the shortened two-year period to claims based on the medical malpractice of "an employee or agent of a licensed health facility or agency who s engaging in or otherwise assisting in medical care and treatment," as well as that of a licensed health care professional. *See* MCL 600.5838a(1); MSA 27A.5838(1)(1).
>
> 459 Mich at 891.

The Court in *Regalski* went on to conclude that, based on this interpretation of MCL 600.5838a, the plaintiff's cause of action was governed by the two year limitations period:

> Like the trial judge, the Supreme Court is persuaded that the technician was "engaging in or otherwise assisting in medical care and treatment" in the performance of the act that is the basis of the lawsuit and that the case, therefore, is governed by the two-year period of limitations applicable to medical malpractice claims.
>
> 459 Mich at 891.

Regalski is a statute of limitations case. The precise holding in *Regalski* is that, where a cause of action is brought against an employee or agent of a licensed health care facility, "who is engaging in or otherwise assisting in medical care and treatment," the limitations period will be two years. This case does not involve the limitations question presented in *Regalski.* It does not involve any question concerning the statute of limitations or the date on which Mr. Ginger's cause of action accrued. Rather, the question presented in this appeal is whether Mr. Ginger's claim is a "medical malpractice" action for purposes of either MCL 600.2912b, the notice of intent statute, or MCL 600.2912d, the affidavit of merit statute. The scope of MCL 600.2912b and MCL 600.2912d were not addressed in this Court's decision in *Regalski.*[4] Indeed, the *Regalski* Court did not address at all the meaning of the term "medical malpractice", as that term is used in MCL 600.5838a(1), much less provide a definition of that term which somehow extends beyond the boundaries of that accrual statute.

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[4]The inapplicability of *Regalski*'s holding to the legal issues presented in this appeal perhaps accounts for the defendant's complete failure to even cite *Regalski* in any of the three motions or briefs which it filed in the trial court claiming that this was, in fact, a medical malpractice action. Despite the fact that all three of these motions were filed after the release of this Court's order in *Regalski*, that summary decision was never mentioned by the defendant. (Apx. pgs. 30a-43a; Apx. pgs. 63a-76a; Apx. pgs. 196a-214a).

The precise holding reached by the Court in *Regalski* does little to advance the interests of the defendant herein since the instant case does not involve a limitations question. What the defendant would draw from *Regalski*, therefore, is something which was not even addressed in this Court's brief disposition of that case - whether the facts raised in *Regalski* constituted a claim for medical malpractice or, alternatively, for ordinary negligence. Clearly, there was no discussion of this distinction - the distinction which is at the heart of this case - in the *Regalski* decision.

Battle Creek Health Systems glosses over the fact that the *Regalski* decision did not address the issue which is squarely presented in this case, and it contends in its brief that any time an agent of a licensed health care facility is engaged or assisting in the care and treatment of a person, any injury which a person receives constitutes medical malpractice. This argument is directly refuted by this Court's decisions in *Adkins, supra*, and *Wilson, supra*. In *Adkins*, the Court expressly noted that "some hospital errors in patient treatment may, of course, be ordinary negligence rather than malpractice." 420 Mich at 95, n. 10; *Wilson,* 411 Mich at 611; *see also Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652; 438 NW2d 276 (1989); *MacDonald v Barbarotto*, 161 Mich App 542, 549; 411 NW2d 747 (1987). *Adkins* fully acknowledged that some accidents occurring during the course of medical treatment will be properly characterized as ordinary negligence. This holding in *Adkins* cannot be harmonized with the expansive reading of *Regalski* which the defendant proposes.

The broad reading of *Regalski* which defendant offers is also fundamentally at odds with *Dorris*, the decision which represents the most important ruling from this Court on the distinction between medical malpractice and ordinary negligence. The *Dorris* decision was

issued by this Court approximately eight months after the Court's summary disposition in *Regalski*. The *Dorris* opinion reaffirmed a considerable body of prior case law setting out the factors which a court must consider in distinguishing between ordinary negligence and medical malpractice. The Court in *Dorris* did not in any way suggest that any injury which occurs during the care and treatment of a patient is automatically to be classified as a medical malpractice claim. *Dorris,* instead, explicitly recognized that there will be injuries occurring during the course of a patient's care which do not involve the exercise of medical judgment and which, therefore, are not to be classified as claims for medical malpractice.

Finally, the defendant's broad reading of *Regalski* is also refuted by an analysis of the history of the language which is presently contained in MCL 600.5838a(1), the statute which was being construed by the Court in *Regalski*. This history has been addressed at some length in the brief filed on behalf of the plaintiff in the companion case to this one, *Bryant v Oakpointe Villa Nursing Centre, Inc.*, Supreme Court No. 121723. Rather than repeating this historical analysis of the pertinent statutory language, plaintiff would simply refer the Court to the brief filed in *Bryant.*

For all of these reasons, the defendant's reliance on this Court's order in *Regalski* is misplaced.

D. The Defendant's Three Proffered Reasons For Treating This Case As A Medical Malpractice Action Are Unavailing.

Beginning at page 30 of its brief, the defendant argues that there are three reasons why this case should be categorized as a medical malpractice action. Notably absent from these three reasons is any mention of *Dorris* and the controlling test for distinguishing between medical

malpractice and ordinary negligence which is set out in that case. Thus, the three reasons offered by the defendant as to why this is a medical malpractice case appear to miss the point. However, in the interest of completeness, plaintiff will respond briefly to these arguments.

The defendant first suggests that the facts of this case appear to be controlled by *Regalski*. As noted in the previous section of this brief, *Regalski* did not address the critical question presented in this appeal - whether plaintiff's claim is one for "medical malpractice" as that term is used in MCL 600.2912b and MCL 600.2912d.

The defendant further suggests that this case was somehow tried as a malpractice action. This is a complete misstatement. Plaintiff never treated this as a malpractice case. Obviously, plaintiff did not prepare a notice of intent or submit an affidavit of merit because plaintiff viewed this case from its inception as one for ordinary negligence. Plaintiff never alleged malpractice in his Complaint. At trial, plaintiff never argued before the jury that this was a medical malpractice case and plaintiff presented no evidence whatsoever to support the view that this was a medical malpractice action. Plaintiff's counsel never suggested that Ms. Kever or Mr. Horton were negligent because they failed to exercise appropriate medical judgment. Rather, in presenting this case to the jury, plaintiff's counsel argued that the negligence involved herein was based on defendant's agents failure to pay attention. (Apx. pg. 45b). Moreover, in his closing argument plaintiff's counsel echoed Ms. Kever's trial testimony in urging the jury that it was common sense, not medical decision-making, which should guide its determination of whether defendant was negligent:

> Remember I asked her did she have any special training for this kind of thing. She said no and she says – I said is it just common sense, and yes. That's what – that's what you have to use, good

judgment, and that's all the test here is as to what the Judge will tell you.

(Apx. pg. 46b).

The record reflects that it was the defendant who consistently attempted to make this case into a malpractice action. Thus, it was the defendant which, at the conclusion of the proofs, requested jury instructions applicable to malpractice claims and it was the plaintiff who objected to these proposed instructions. (Apx. pgs. 40b-41b). This case was neither pleaded, tried nor presented to the jury as a medical malpractice action and the defendant's argument to the contrary is completely baseless.

Finally, Battle Creek Health Systems claims that the jury's verdict somehow supports the view that this was a medical malpractice action. In making this argument, the defendant cites to the jury's response to a question on the verdict form which indicated that, as between Ms. Kever and Mr. Horton, the jury assessed 100% of the fault against Mr. Horton. (Apx. pgs. 70b-71b).

Before addressing the specifics of this argument, it is important to assess the legal significance of the single question on the verdict form on which the defendant relies in making this argument. In his original Complaint, Mr. Ginger alleged that his injury occurred as a result of the negligence of the two people who were involved in his bone scan, Mr. Horton and Ms. Kever. (Apx. pg. 27a). Mr. Ginger further alleged in his Complaint that both of these individuals were employees of Battle Creek Health Systems. (Complaint, ¶5; Apx. pg. 27a). In the Answer which it filed in response to that Complaint, Battle Creek Health Systems admitted that the two individuals who were involved in Mr. Ginger's June 26, 1997 bone scan were its employees. (Answer, ¶5; Apx. pg. 1b).

Thus, from the very outset of this case, there was never any dispute that, if either Ms. Kever or Mr. Horton were found to be negligent, Battle Creek Health Systems would be responsible for that negligence under the theory of *respondeat superior*. It is, therefore, not at all surprising that when this case went to trial, there was no dispute that Battle Creek Health Systems would be held vicariously liable for the negligence of either Mr. Horton or Ms. Kever. At the beginning of his opening statement, counsel for the defendant acknowledged this fact, advising the jury that, "the hospital acts through its employees and agents *and we are in agreement that the employees are agents.*" (Apx. pg. 3b) (emphasis added).[5]

Despite the fact that there was never any dispute that Battle Creek Health Systems would be held liable for Mr. Ginger's injuries regardless of which of its employees were negligent, counsel for the defendant insisted at the conclusion of the proofs that the jury be given an instruction requiring it to allocate fault between Mr. Horton and Ms. Kever. (Apx. pg. 37b). The reason given by the defendant's counsel for the inclusion of this question on the verdict form was his interest in assessing the relative fault of Battle Creek Health Systems and that of Kellogg Community College, the college which Ms. Kever was attending at the time of Mr. Ginger's accident. Defendant's counsel argued that this allocation question should be included on the verdict form because, "it allows me to allocate fault between the hospital and the community college." (*Id.*)

Plaintiff's counsel objected to the inclusion of this question on the verdict form. (Apx.

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[5]Moreover, in instructing the jury to respond to the question concerning the allocation of fault between Mr. Horton and Ms. Kever, the trial court even described this determination as "the contribution of the two individuals *who are employed by the defendant.*" (Apx. pg. 63b). Thus, in posing this question to the jury, the trial court conceded that both Mr. Horton and Ms. Kever were employees of the defendant.

pgs. 38b-39b; 42b-43b). In making his objection, plaintiff's counsel pointedly observed, "what difference does it make, to what percentage either one of them is negligence?" (Apx. pg. 42b). While plaintiff's counsel's question was never answered, his objection was overruled (Apx. pg. 38b), and the jury was instructed to respond to the question on the verdict form allocating fault between Mr. Horton and Ms. Kever. (Apx. pgs. 63b-64b).

There can be no doubt that the question on the verdict form purporting to allocate fault between Mr. Horton and Ms. Kever was completely irrelevant to this case and should not have been submitted to the jury.[6] The defendant's attorney convinced the trial court to present this question to the jury on the basis that he required an allocation of the respective fault of Mr. Horton and Ms. Kever for purposes of a future claim against Ms. Kever's school, Kellogg Community College. (Apx. pg. 37b). This argument is pure nonsense.

Let us assume for the moment that Battle Creek Health Systems did, in fact, have a basis for claiming some amount of fault against Kellogg Community College for the negligence committed by Ms. Kever on June 26, 1997. If the defendant had such a negligence claim against Kellogg Community College, there is no question how that claim had to be preserved and pursued under existing Michigan law. Under these circumstances, Kellogg Community College would have been like every other potential non-party tortfeasor. This means that Battle Creek Health Systems would have had to give pre-trial notice of its claim of fault against Kellogg Community College as required by MCR 2.112(K). It also means that, assuming proper notice was given under MCR 2.112(K), Battle Creek Health Systems would have been compelled at

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[6]Moreover, this jury question, contrary to the intimations of defendant's counsel was in no way relevant to a potential future case between Battle Creek Health Systems and Kellogg Community College.

trial to present all of its evidence bearing on the fault of Kellogg Community College and, following the presentation of these proofs, the jury would have been compelled to allocate fault among all potential tortfeasors, including Kellogg Community College. MCL 600.6304(1)(b). To the extent that some portion of fault was allocated against Kellogg Community College, that allocation would have served to reduce directly the amount of any judgment to be entered against Battle Creek Health Systems. MCL 600.6304(4).

The foregoing describes the way that the potential liability of a third party must be presented under Michigan law. Obviously, that is not the way that the potential liability of Kellogg Community College was addressed in this case. The defendant never identified Kellogg Community College as a non-party tortfeasor under MCR 2.112(K). Moreover, Battle Creek Health Systems presented no evidence at trial suggesting that Kellogg Community College was somehow negligent in conjunction with Mr. Ginger's accident.

Thus, the only claim of negligence presented in this case involved the negligence of two individuals, Mr. Horton and Ms. Kever, both of whom were conceded to be employees of the defendant. Since the defendant was liable for the negligence of these two employees regardless of which one was found to be negligent and since the potential negligence of Kellogg Community College was completely irrelevant in this case, there was absolutely no reason for the trial court to include on the verdict form an allocation of fault between Mr. Horton and Ms. Kever. Counsel for the plaintiff timely and strenuously objected to the inclusion of this question on the verdict form for the unassailably correct reason that this proposed allocation made no difference whatsoever to the outcome of the case. (Apx. pgs. 38b-39b; 42b-43b).

The trial court patently erred in allowing this irrelevant allocation question to be

presented to the jury. Since it was error for the trial court to submit this verdict form question over the plaintiff's objection, none of the arguments which the defendant makes on the basis of the jury's response to this irrelevant inquiry, should be considered by this Court.[7]

Irrespective of the error associated with submitting this allocation question to the jury, there is another reason why this aspect of the verdict form must be disregarded. Since the allocation of fault between Mr. Horton and Ms. Kever was absolutely irrelevant to any of the issues presented in the case, it is not particularly surprising that the instructions given by the trial court did not inform the jury precisely why this question was being submitted for its consideration. Even more important, because this allocation issue was of no relevance whatsoever to this case, the jury was not even advised precisely how this allocation was to be undertaken. While the remainder of the instructions and the verdict form was addressed to the parties' negligence, the verdict form question referred to the *fault* of Mr. Horton and Ms. Kever. The term "fault" was not addressed in the jury instructions. The jury was simply given a verdict form and told that they had to allocate fault between Mr. Horton and Ms. Kever.

The defendant expends some amount of effort in its brief "interpreting" the jury's response to this allocation question. The defendant would draw from this response that Mr. Horton was found negligent based on his supervisory capacity or in his role as a clinical instructor. There is really no basis for interpreting the jury's response in this way for the relatively simple reason that there is no legitimate basis for drawing anything from the jury's

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[7]This includes not only the defendant's assertion that this verdict form response regarding allocation supports the existence of a medical malpractice claim, it also applies to the defendant's arguments that the jury's allocation of liability between Mr. Horton and Ms. Kever supports the conclusion that the verdict was against the great weight of the evidence or that the jury's verdict was somehow inconsistent. *See* Issue III, *infra*.

response to a question which (1) did not need to be asked, and (2) was never adequately explained to the jury.

In any event, the defendant suggests that the jury's response to the allocation question somehow establishes that Mr. Horton was being held liable in some supervisory capacity. This is not necessarily accurate. The jury could well have concluded that Mr. Horton was directly liable for Mr. Ginger's injuries by failing to take the necessary precautions to prevent Mr. Ginger from falling. The jury may have concluded that Mr. Ginger should not have been advised that he could get up and leave until Mr. Horton had completed his functions and was available to assist Mr. Ginger in getting off the table. Indeed, this would appear to be the only logical interpretation of the jury's verdict in light of the fact that the jury found Mr. Horton *directly* responsible for *all* of the fault in this case. For if the jury's verdict regarding allocation is accepted, none of the fault for this incident rests with Ms. Kever. Since she has no fault of her own, the allocation of fault as against Mr. Horton could not have been premised on his vicarious or supervisory responsibility for the negligence of Ms. Kever.

II. THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE BASIS OF MCivJI 10.02.

The second argument which Battle Creek Health Systems raises is that the trial court erred in giving the jury an instruction based on MCivJI 10.02. The trial court gave the following instruction with respect to negligence:

> Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful person would use. Therefore, by negligence, I mean the failure to do something that a reasonably careful person would do or the doing of something that a reasonably careful person would not do under the circumstances that you find existed in this case.

> The law does not say what a reasonably careful person using ordinary care would or would not do under such circumstances. That is for you to decide.

(Apx. pg. 53b).

Battle Creek Health Systems objects to this instruction, arguing that the standard should not be based on what a "reasonably careful person" would or would not do under the circumstances. Instead, the defendant insists that the trial court should have told the jury to base its decision on what a "reasonably careful student trainee" or what a "reasonably careful x-ray technician" should have done under the circumstances.

The defendant's claim of instructional error is merely a repackaged formulation of its claim that Mr. Ginger's cause of action constitutes one for medical malpractice, not a claim for ordinary negligence. *See* Issue I, *supra*. There can be no doubt that when this case is properly characterized as one based on ordinary negligence, the instruction given by the circuit court must be deemed proper. This point was made clear in the Court's decision in *Lince v Monson*, 363 Mich 135; 108 NW2d 845 (1961), where the Court stated:

> *In the ordinary negligence case a question is presented whether an ordinary, careful and prudent person would have done as defendant did under the circumstances*. Presumably a jury of 12 persons, drawn from and representing a cross section of the community, is competent to judge that question, on the basis of its own knowledge and experience, and to determine negligence or freedom therefrom accordingly.

(*Id.* at 139) (emphasis added).

As *Lince* demonstrates, in an ordinary negligence case the general standard of conduct is precisely that which is contained in MCivJI 10.02 - what a reasonably careful person would do under the circumstances. The Court of Appeals was, therefore, correct in holding that because

this case was one for ordinary negligence, the defendant's request for a specialized instruction on the general standard of care must be rejected. (Apx. pgs. 250a-251a).

While *Lince* should be dispositive of this argument, several other observations are in order. First, the defendant makes the case in support of its proposed instruction by arguing the following in its brief:

> This necessary modification of the instruction was improperly omitted from the jury's consideration, resulting in an incorrect and misleading instruction as to what a reasonable person would do. There ***may be*** multiple valid reasons which would lead a reasonable radiology technician to act differently than a reasonable person off the street, including professional knowledge of how the tables are construed, whether the side rails interfere with mobility or how the patient's condition is affected by the procedure and medications.
>
> Defendant's Brief, p. 39 (emphasis added).

What is of considerable significance here is the italicized qualifier contained in this quotation from the defendant's brief. According to the defendant, there *may be* multiple valid reasons why a student trainee or an x-ray technician might act differently than the average reasonable person. The defendant, however, does not bother to elaborate on what these "multiple valid reasons" might be. More importantly, there is absolutely nothing in the trial court record to support the assertion that a student trainee or an x-ray technician would respond differently than the average, reasonable person. Much as it has with respect to its claim that "medical judgment" is involved in this case, *see, supra*, pp. 16-23, Battle Creek Health Systems simply *announces* in its brief that there might be differences in how a student trainee or an x-ray technician might react to Mr. Ginger's situation.

Obviously, a trial court is compelled to provide the jury with instructions which are based

on the evidence actually presented at trial. *Klanseck v Anderson Sales & Service, Inc.*, 426 Mich 78, 91; 393 NW2d 356 (1986); *McKinch v Dixon*, 391 Mich 282, 294; 215 NW2d 689 (1974). It is the evidence presented at trial which dictates what instructions are to be given. A trial judge is not required to instruct a jury on the basis of a party's contention that there "may be" evidence supportive of its proposed instruction. Thus, because the defendant presented no evidence to support its proposed instruction, the trial court did not err in refusing to give it.

Finally, the defendant's request for a new trial based on a specialized negligence instruction makes little sense. The simple fact is that the more specialized the instruction regarding the character of the negligence, the *higher* the standard of care becomes. This rather basic fact is demonstrated in the principal case on which the defendant relies, *Laney v Consumers Power Co.*, 418 Mich 180; 341 NW2d 106 (1983). *Laney* was a suit against a power company arising out of the electrocution of a sixteen year old boy. At trial, the jury was instructed that the negligence of the power company was to be judged on the basis of what "a reasonably careful person would do . . . or not do under the circumstances." 418 Mich at 182, n. 2. The jury returned a verdict in favor of the defendant and the plaintiff appealed from the judgment which followed.

A majority of this Court in *Laney* held that the reasonably careful person instruction given by the trial court was prejudicial *to the plaintiff*:

> We find that the reasonable care instruction that was given was defective and that reversal is required because it failed to inform the jury that application of the standard in this case required the jury to measure the defendant's conduct by what a reasonably careful company engaged in the business of maintaining electric power lines would do under the same circumstances. Absent this crucial instruction, the jury may well have judged the defendant's

> conduct by what a reasonably careful person not engaged in defendant's business would have done under the circumstances.

Id. at 186-187.

Laney demonstrates rather dramatically that the more specialized the standard of conduct instruction, *i.e.*, the more an instruction requires the trier of fact to consider the experience, training and knowledge of a person "more qualified" than the hypothetical reasonable person, the *higher* the standard of conduct imposed on the defendant will be. Thus, if one accepts the defendant's argument that a more specialized instruction should have been given in this case, it was the plaintiff, not the defendant, who would be prejudiced by the failure to give this instruction.[8] The defendant is not entitled to a new trial on the basis of a trial court's instruction

> requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice.
>
> *Id.* at 6 (citation omitted, emphasis added).

By instructing the jury on the basis of MCivJI 10.02, the trial judge, on balance, adequately and fairly presented the parties' theories and defenses. There was no reversible error in the instruction given in this case.

For each of these reasons, the defendant's request for a new trial based on alleged instructional error must be rejected.

III. THE DEFENDANTS ARE NOT ENTITLED TO A JUDGMENT NOTWITHSTANDING THE VERDICT OR A NEW TRIAL.

In the final issue of its brief, Battle Creek Health Systems argues that, based on the evidence presented at trial, it is entitled to either a judgment notwithstanding the verdict or a new trial.

This Court's order granting leave to appeal in this case did not specify the issues on which leave was being granted. Thus, plaintiff cannot contest that the jnov and new trial issues raised by the defendant are properly before the Court. *See* MCR 7.302(F)(4). Clearly, in consolidating this appeal with the *Bryant* case, the Court has decided to review the jurisprudentially significant question of the parameters of an action for medical malpractice. However, the final issue raised in the defendant's brief has no widespread legal significance. As presented, this issue contains only somewhat muddled arguments as to why under the particular facts of this case, plaintiff's trial proofs were allegedly inadequate. The question of whether in a personal injury case a particular trial court record supports a jury's verdict has seldom

commanded the full attention of this Court. Plaintiff would suggest that the issues raised in the final portion of the defendant's brief do not require this Court's full attention. As such, plaintiff would ask the Court to decline consideration of these issues. The Court should be particularly prone to do so in light of the fact that there is no merit to the defendant's argument in support of a jnov or new trial. This lack of merit will be the subject of the remainder of this brief.

The defendant's argument regarding jnov and/or new trial is somewhat difficult to decipher. The argument begins with an introductory section on the essential elements of a negligence action, with some given to the question of proximate cause. Defendant's Brief, pp. 40-41. But, in the substance of its argument, the defendant does not appear to make any claim that the evidence with respect to causation was somehow inadequate. Moreover, the title to this Issue currently indicates the defendant is requesting a directed verdict or jnov. Defendant's Brief, p. 40. But, when the defendant gets around to the subject of the inadequacy of the verdict, this argument is couched in terms of the jury's verdict as being against the great weight of the evidence. Defendant's Brief, p. 42. The defendant's argument is, in short, somewhat difficult to respond to because there is some amount of guess work in attempting to determine precisely what the defendant is claiming.

In any event, it would appear that the defendant is making some argument regarding the absence of duty. The negligence concept of duty focuses on "whether the defendant is under *any* obligation to the plaintiff to avoid negligent conduct." *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977) (emphasis in original).[9] Duty, therefore, fundamentally concerns "the problem

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[9]In *Moning* and several other cases, the Court has admonished that the duty component in a negligence case must be separated from other elements in a negligence claim, including questions concerning the standard of conduct flowing from that duty. *Moning*, 400 Mich at 437-

of the relation between individuals which imposes upon one a legal obligation for the benefit of the other." *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992), *citing Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981); *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993). Based on the relationship between Mr. Ginger and the defendant's agents, there can be no doubt that a duty exists here.[10] Mr. Ginger was ordered by his physician to undergo a bone scan. That procedure required Mr. Ginger to put himself in the control of Mr. Horton and Ms. Kever for a period of time. Mr. Ginger had to use a stool to get onto what the defendant acknowledges was a tall, narrow x-ray table. He was required to move on that table in various poses while a series of x-rays were taken. When that process was completed, he was told that he could get up from the narrow table which he had been lying and moving on. The defendant's agents responsible for conducting the bone scan had a duty, based on the relationship existing between them and Mr. Ginger, to see that Mr. Ginger safely alighted from the narrow x-ray table. Duty is not a serious consideration under these facts.

The defendant also appears to suggest that there was insufficient evidence on the question of whether the defendant breached the standard of care. The common law of this state generally describes two standards of care. The first, the general standard of care, never varies. *Moning*,

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438. The defendant's argument before this Court fails to heed *Moning*'s warnings, melding together these different elements in a negligence case.

[10]The defendant appears to suggest that there was some deficiency in the proofs at trial regarding duty. The defendant argues that "none of the participants was quite clear on exactly what duty was being alleged." Defendant's Brief, p. 42. Duty is (in a vast majority of cases) a purely legal question, not an issue for the jury. It would, therefore, be somewhat unusual for the parties to present evidence at trial bearing directly on the existence of a duty. The fact that the three participants to this were clear on the question of duty in their trial testimony should not be particularly surprising to anybody.

400 Mich at 443. It is always the responsibility "to conduct one's affairs in the manner of a reasonably prudent person." Taylor, *et al.*, West Group Michigan Practice Guides, Torts, [2:48], pp. 2-14, 2-15.; *Moning*, 400 Mich at 443. The specific standard of care requires consideration of whether, under the facts of the case at hand, the defendant's conduct complied with what a reasonably prudent person would have done. *Moning*, 400 Mich at 438 (describing the specific standard of care as "whether defendant's conduct in the particular case is below the general standard of care."). It is the jury's responsibility to decide the specific standard of care. *Id*; *Case v Consumers*, 463 Mich at 7; *Lowe v Estate Motors, Ltd*, 428 Mich 439, 456; 410 NW2d 706 (1987) (Opinion by C. J. Riley).

The jury had all of the evidence it needed to make its determination that the agents of the defendant failed to act as reasonably prudent persons would have acted under the circumstances that existed herein. The jury had all of the evidence it needed to conclude that, when an 86 year old man is lying on a tall, narrow table for purposes of a bone scan during which he was required to frequently change his body position and where that 86 year old man required the assistance of a stool to get onto the table to begin with, it is perfectly reasonable to anticipate that this 86 year old man may require some assistance in getting off the table once the procedure is completed. Thus, a jury could reasonably conclude that the defendant's agents should have taken some reasonable precautions to prevent Mr. Ginger from falling from the table after announcing to him that his bone scan was completed. As noted by the Court in *Moning*, "the trier of fact decides whether reasonably precautions have been taken and thereby establishes the specific standard of care." *Id.* at 449, n. 27; *Lowe*, 428 Mich at 456. The jury in this case concluded that the defendant's agents did not take reasonable precautions to prevent Mr. Ginger's fall. The jury had

the evidence it needed to make this determination.

The defendant also argues that this case does not fit within the concept of *res ipsa loquitur*. Plaintiff agrees. This is not a *res ipsa loquitur* case. The purpose of the *res ipsa loquitur* doctrine is to create "an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Jones v Poretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). Here plaintiff was not required to resort to *res ipsa loquitur* since the nature of the defendant's negligent act was proved directly. Mr. Ginger fell because of the failure of the defendants' agents to take reasonable precautions after telling him that he could get up and leave.

This case might have been a candidate for *res ipsa loquitur* if, for example, Mr. Ginger fell asleep while on the x-ray table and when he woke up his hip was fractured. In such a circumstance, the jury might be asked to infer negligence based solely on the injury Mr. Ginger sustained despite the fact that Mr. Ginger might not be able to prove the occurrence of a negligent act. In this case, however, the jury did not need to speculate how Mr. Ginger fractured his hip; that injury occurred when he fell off the table. Moreover, in this case, the jury did not need the inference of negligence called for the *res ipsa loquitur* theory because the jury could decide on the evidence presented that the defendant's agents were negligent for failing to take reasonable precautions to insure the safety of Mr. Ginger at the conclusion of the bone scan.

The final issue raised in the defendant's brief is that the jury's verdict is somehow inconsistent. In making this argument, the defendant returns to the question on the jury form allocating fault between Ms. Kever and Mr. Horton. The defendant argues that the jury's finding of liability against Battle Creek Health Systems is inconsistent with its finding of no negligence as to Ms. Kever.

This argument is premised on the jury's response to a question on the verdict form which should never have been submitted to the jury. As discussed previously, this question on the verdict form was presented to the jury over the timely and entirely appropriate objection of plaintiff's counsel. *See supra*, pp. 31-35. The defendant must not be allowed to argue the inconsistency of the jury's verdict based on a portion of the verdict which was erroneously submitted to the jury.[11]

There are, however, other another reasons why defendant's request for a new trial on the basis of an alleged inconsistency in the jury's verdict must be denied.

Under this Court's decision in *Kelly v Builders Square, Inc.*, 465 Mich 29; 632 NW2d 912 (2001), it is clear that any inconsistency in the jury's verdict cannot be the basis for a new trial. In *Kelly*, the Court considered a personal injury action in which the jury found the defendant to be negligent and awarded the plaintiff medical expenses, but did not award any amount of damages for pain and suffering. The trial court found the jury's verdict to be "inconsistent and incongruous", and ordered a new trial.

In *Kelly* this Court reversed that decision. In so doing, the Court indicated that the only grounds on which a party may be awarded a new trial are those grounds which are specifically identified in MCR 2.611(A). The Court then noted that an inconsistency in a verdict is not one of the grounds listed in MCR 2.611(A):

> The grounds for granting a new trial, including a verdict contrary to the great weight of the evidence, are now codified at MCR 2.611(A)(1). *The court rule provides the only bases upon which a*

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[11]To put this another way, the defendant cannot be allowed to suggest that the jury's verdict makes no sense, *i.e.* that it is internally inconsistent on the basis of a jury verdict form question which had absolutely no business being submitted to the jury.

> *jury verdict may be set aside* . . . A jury's award of medical expenses that does not include damages for pain and suffering does not entitle a plaintiff to a new trial unless the movant proves one of the grounds articulated in the court rule.
>
> * * *
>
> Similarly, the trial court did not cite any basis in the court rule for setting aside the original jury verdict. It merely stated that the failure to award pain and suffering damages was "inconsistent" and "incongruous." *MCR 2.611(A)(1) does not identify inconsistency or incongruity as a ground for granting a new trial. The court abused its discretion by granting a new trial without finding a basis in the court rule.*
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> 465 Mich at 38-39 (emphasis added).

Under *Kelly*, the defendants are not entitled to a new trial even if the verdicts could be construed as inconsistent, since an inconsistency in the verdict is not one of the grounds for a new trial itemized in MCR 2.611(A)(1). *See also Advanced Friction Material Co v Sterling-Detroit Co.*, 466 Mich 863; 644 NW2d 762 (2002).

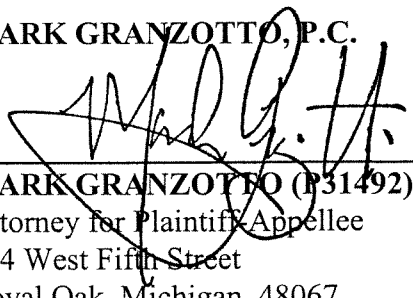
Finally, the defendant's inconsistency argument is again premised on the notion that the jury's allocation of fault to Mr. Horton constitutes a finding against him in some supervisory capacity. Thus, in defendant's view, is not consistent with an ordinary negligence theory. Plaintiff would reiterate that there is little to be gained in attempting to "interpret" the jury's allocation of fault as between Mr. Horton and Ms. Kever. However, if one accepts that determination on its face it would appear that Mr. Horton could not have been found liable in his supervisory capacity over Ms. Kever since the jury assessed no degree of fault against Ms. Kever. The jury's allocation finding, therefore, means Mr. Horton was not assessed *respondeat superior* liability. This would presumably mean that, based on the jury's allocation response, the entirety

of Mr. Horton's fault was his direct liability. This would presumably mean that he was found to be at fault not for his failure to properly supervise Ms. Kever, but for his own failure to take reasonable precautions to prevent Mr. Ginger from falling.

RELIEF REQUESTED

Based on the foregoing, Plaintiff-Appellee, Mildred L. Lawrence, personal representative of the Estate of Lloyd C. Ginger, respectfully requests that this Court affirm the Court of Appeals' ruling in its entirety.

MARK GRANZOTTO, P.C.



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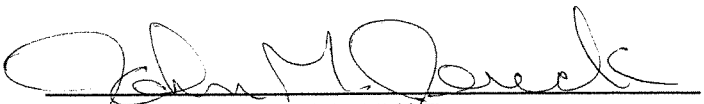

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